SCCH 238096

The Small Claims Court of Nova Scotia
Cite as: Smith v. Landry, 2005 NSSM 37

Shawn William George Smith

Claimant

And

Nora Landry

Defendant

Heard: March 22, 2005
Decision: April 7, 2005

Adjudicator: David T. R. Parker

Decision and Order

This matter came before the Small Claims Court in Halifax on March 22, 2005. All of the parties appeared and there being no objection as to why the matter should not be heard, it proceeded accordingly. It became evident from the beginning, any contract was between the defendant Landry and not Century 21 Classic Realty Ltd. therefore, the claim against Century 21 Classic Realty Ltd. shall be discontinued. The claimant and defendant entered into an agreement whereby the claimant would do work for the defendant, which involved dry walling or gyproc work to the premises where the defendant's business was located or going to be located.

The defendant drafted the contract and the parties executed the agreement in November of 2004. With respect to the gyproc the agreement stated that the claimant "will install gyproc, tape, fill and sand [walls will be ready for paint] the second story addition at 192 Wyse road Dartmouth, according to the review of the site plans and an on site meeting." And further the agreement stated, "It is agreed the cost is $.053 per square foot." The rest of the contract is inconsequential to the concern or matter before this court.

On December 3, 2004 the claimant invoiced the defendant. Prior to paying the full amount of the invoice, the defendant drafted and provided another document to the claimant, which the claimant executed. In this particular document dated December 13, 2004 the defendant reduced the contract price by 10% and noted same as a waste discount. This agreement was noted as, **without prejudice**, however it was consented to or at least not objected to as being entered as exhibit by the claimant. This particular document, which the claimant executed along with another party who was also doing work for the defendant, showed that the balance due the claimant by the defendant was $407.90. The waste discount amounted to a total of $881.20. It is that amount and additionally the amount of $407.90, which the claimant is now claiming against the defendant.

The defendant also drafted the document dated December 13, 2004 and it stated in part, "*all parties agree that these adjusted figures represent the outstanding balance for the contract*." This document was accompanied or attached to a letter dated December 10, 2004 offered by the defendant and said in part "… *I am enclosing a check for payment in full of the attached contract. Cashing this check will indicate that this is considered payment in full and you waive any further rights to this contract.*"

The defendant argues at that the agreement of December 13, 2004 should stand. However, the defendant fails in this argument in a couple of respects.

A contract, which changes existing obligations in a previously existing contract, will not be valid for lack of good and valuable consideration. In other words the initial contract of November 2004 stands on its own and continues to stand on its own. The element of genuine consent is also lacking or missing from the second agreement dated December 13, 2004 and is also a cause for the contract being void from the beginning. When I mentioned lack of genuine consent I'm referring to the fact that the second document was signed under duress in that the claimant felt neither he and more importantly to him his colleague who was owed a much larger

amount by the defendant would not get paid unless he, the claimant executed the document.

With respect to the first contract the defendant argues that she was prepared to pay for gyproc installed but not for the gyproc that was not installed. As it turns out there were a few sheets that were not installed in which the claimant did not charge the defendant. However it was the defendant's contention that only the amount of actual square footage of gyproc used for the walls of the building should be the amount for which she should be charged. The Claimant contends that she should be charged for only that amount of gyproc actually used and as applied to the walls in the premises. The defendant said that she should not be charged for parts of the gyproc, which were not in spaces, where for example windows were located. The claimant on the other hand said that is not industry standards as there is going to be waste when gyproc is applied in widow areas, corners and around objects that might exist in a room. I accept the claimant's position as being reasonable and logical. The same number of sheets of gyproc would be used in a building with no windows versus a building with Windows in the sense that the building with Windows would have waste where the window area of the gyproc would be cut out. The cut out portion, being of course waste material and which would be no fault of the contractor. It's just the nature of the project or the building itself. It is noted at the trial the claimant was paid $407.90 by the defendant and therefore that amount is no longer due to the claimant or might be considered a credit to the full amount of the claim. Therefore the amount due the claimant is $881.20 plus HST and the Claimant will be awarded his costs as well. I do note that during the trial there was some testimony from the defendant's witness that a great deal of gyproc was wasted, a lot more than he would have anticipated. While the claim or rather the defense of the defendant as articulated in court concerned the actual amount all of gyproc used, the document of December 13, 2004 reduces the amount owing due to waste. This letter purports a reduction in the amount owing to the claimant based on waste in the use of gyproc, which is different from the Defense articulated in court. The question then is should I reduce the amount owed to the claimant due to an excess of material or gyproc unnecessarily used in the dry walling of the defendants premises. I think not, for two reasons: First, the defendant workers removed the waste on a continual basis therefore not allowing parts of it to be reused if appropriate or if possible. Secondly there is no evidence or convincing testimony of the amount of the wastage.

It Is Therefore Ordered That the defendant Nora Landry shall pay the claimant the following sums:

$881.20
$132.18 HST
$80.00 Court costs
$1093.38

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David T.R. Parker
Adjudicator of the Small
Claims Court of Nova